

DIVISION IV

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
WENDELL L. GRIFFEN, Judge

CA06-345

December 6, 2006

GLENN KUBECZKA  
APPELLANT

AN APPEAL FROM PULASKI COUNTY  
CIRCUIT COURT  
[No. DR 02-725]

v.

SHERRY KUBECZKA GRAHAM  
APPELLEE

HONORABLE VANN SMITH,  
CIRCUIT JUDGE

AFFIRMED

Appellant Glenn Kubeczka brings this appeal from an order of the Pulaski County Circuit Court denying his motion to terminate his obligation to pay alimony to appellee Sherry Kubeczka Graham. Kubeczka raises one point for reversal—that the trial court abused its discretion in denying his motion because of such factors as Kubeczka’s experiencing a substantial reduction in income, Graham’s refusing to work, and Graham’s no longer needing alimony following the sale of the former marital residence. We affirm.

Graham and Kubeczka were divorced in July 2003, after more than twenty years of marriage. At that time, Kubeczka was ordered to pay alimony of \$2,324 per month until the marital home sold. Graham was awarded the marital residence but was ordered to sell it. Once the marital home was sold, Kubeczka’s obligation was to be reduced to \$1,750 per

month for a period of twenty-four months. After that period expired, the obligation was to be further reduced to \$1,000 per month. The decree also provided that employment by Graham may be considered a change in circumstances for which the alimony may be reduced. In March 2004, the trial court entered an order reducing Kubeczka's obligation to \$1,750 because there had been a delay in the sale of the marital residence. The May 2004 sale of the residence netted Graham \$302,091.98.

On June 13, 2005, Kubeczka filed his petition seeking the elimination or reduction of his alimony obligation. The motion asserted that Kubeczka had suffered a reduction in income since entry of the 2004 order and that Graham no longer needed alimony because she received approximately \$300,000 from the sale of the residence. Graham denied the allegations.

At trial, Graham testified that she sold the marital residence that had been awarded to her as her portion of the marital property for approximately \$300,000. With that money, she said she purchased a home for \$85,000 and made \$17,000 worth of repairs to her new home. She said that she invested the remaining balance in annuities that would pay a monthly sum when she turns sixty-five. She discussed a letter she sent Kubeczka in 2004 that declared her intention not to work. She said that she would like to work but was not physically able to do so due to hip surgery. Graham added that additional surgery would be needed. She also discussed her affidavit of financial means listing monthly income from alimony of \$1,453 and monthly living expenses of \$1,392.

Kubeczka testified that he and Graham started in the real-estate business in 1984 and ended with thirty rental units. He opined that, if Graham had used the \$200,000 from the sale of the marital residence to purchase three rental houses like the home she purchased for her own residence, she could have a monthly rental income of \$2,000. He stated that Graham told him that she will not work. He also asserted that he suffered a decrease in income from his insurance business.

Kubeczka testified that he ceased being an insurance agent and sold most of his rental properties in 2005 in order to go into real-estate development. He said that the properties sold for over \$1 million before the mortgages were paid. As a result of these sales, Kubeczka said that he would have to pay approximately \$200,000 in capital gains taxes. He stated that he has income of approximately \$1,600 per month from his remaining rental properties but that it does not meet his monthly living expenses. He also testified that he purchased an apartment complex for \$2.5 million. He said that the monthly payments on his business debt is approximately \$20,000, including utility expenses.

Karen Nichols, a certified public accountant, testified that she prepared Kubeczka's tax returns for 2003 and 2004 and that Kubeczka's income decreased in 2004. She attributed the decline in income to the decrease in Kubeczka's insurance business, noting a \$99,743 decrease in gross revenue. Nichols also stated that Kubeczka's income from the rental business increased in 2004. Nichols opined that Kubeczka would incur capital gains tax liability from the sale of rental properties but did not know the extent of the liability.

On November 1, 2005, the trial court entered an order denying Kubeczka's petition. The trial court found that no material change of circumstances existed for a reduction of alimony. The trial court noted that Graham sold the marital home on May 1, 2004, and received approximately \$302,000, of which she used \$87,000 to purchase a home and another \$17,000 for repairs to the home. The court found that Graham used the remaining \$200,000 to purchase an annuity that will provide monthly payments when she turns sixty-five in five years. Although the divorce decree awarded Kubeczka the parties' rental properties, the court found that he had sold most of those properties for \$1 million and had a monthly income of \$1,650 from the remaining rental properties. Kubeczka was also found to have unspecified other monthly income from his recent purchase of an apartment complex.

The court said that Kubeczka's motivation behind the current petition was that Graham refused to work and, in Kubeczka's view, foolishly tied up \$200,000 that will not provide her a monthly income for five years. The court noted that Graham had a full hip replacement and that there was no evidence that she could presently work at her former employment of cleaning and maintaining the parties' rental properties.

Kubeczka timely filed a motion seeking to amend the trial court's findings on November 14, 2005. The trial court denied the motion by order entered on December 1, 2005. This appeal followed.

In his sole point on appeal, Kubeczka argues that the trial court abused its discretion in not terminating the alimony obligation. Kubeczka discusses several circumstances which,

according to Kubeczka, support termination. These include Graham's lack of financial need, Graham's refusal to work, and Kubeczka's reduction in income.

Modification of an award of alimony must be based on a change of circumstances of the parties. *Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998). The burden of showing a change in circumstances is always upon the party seeking the change in the amount of alimony. *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003). The primary factors to be considered in making or changing alimony are the need of one spouse and the ability of the other spouse to pay. *Id.* We review domestic-relations cases de novo, but we will not reverse a trial court's ruling with regard to a payor's alimony obligation unless the court's finding is clearly erroneous. *See id.*

Kubeczka first contends that Graham no longer needed the alimony after she received \$300,000 from the sale of the house. He asserts that, after Graham purchased a new residence, she could have invested the remaining \$200,000 from the sale of the house to provide her with a monthly income. However, this ignores the structure of the original alimony award that provided that the alimony would be reduced upon sale of the residence. Thus, it was contemplated by the original decree that Graham would receive some money from the sale of the residence. This is why the alimony was reduced from \$2,324 per month to \$1,750. Changes in circumstances are not material if they were contemplated at the time of the original award. *See Hass, supra.*

According to Kubeczka, another circumstance warranting a reduction or termination of alimony is Graham's failure to work so that she can support herself. Kubeczka's argument

is based on a letter Graham sent in June 2004 in which she stated that she was not working and did not intend to work. Kubeczka claims that this letter shows the real reason for Graham's not working. However, he offered no proof that Graham was physically able to work. Graham testified that she was physically unable to perform her past employment cleaning rental properties because of hip-replacement surgery. She also expects to have further surgery on her foot. If Graham's condition had improved, the burden was on Kubeczka as the party seeking the modification to show a change in circumstances. *Weeks v. Wilson*, \_\_ Ark. App. \_\_, \_\_ S.W.3d \_\_ (Apr. 19, 2006); *Hass, supra*. The issue of whether Graham was not working was due to a disability or an intention not to work is one of credibility, to which we defer to the trial court. *Weeks, supra*.

Finally, Kubeczka argues that his "drastic" reduction in income warrants a modification of the alimony award. In support of his claim of inability to pay, Kubeczka discusses in some detail his change from the insurance business to ownership of an apartment complex. He states that he is not making a profit from the apartment complex and that the debt service on the loan is \$20,000 per month. He does not argue that he is unable to meet these payments, only that he cannot pay Graham alimony. Kubeczka did not mention it in his testimony, but his 2004 tax return shows depreciation deductions of \$47,585 for his rental properties. The trial court had the discretion to consider this when determining whether Kubeczka's income had decreased for purposes of modifying alimony. *See Gray v. Gray*, 67 Ark. App. 202, 994 S.W.2d 506 (1999). The reduction in income is, of course, a factor to be considered when deciding whether to modify alimony. *Brown v. Brown*, 269 Ark. 112, 598

S.W.2d 747 (1980). However, these changes are the result of decisions made by Kubeczka and cannot be urged as a change in circumstances to justify reduction of alimony. *Hurley v. Hurley*, 255 Ark. 68, 498 S.W.2d 887 (1973); *Taylor v. Taylor*, 8 Ark. App. 6, 648 S.W.2d 505 (1983).

We cannot say that the trial court abused its discretion in not modifying the alimony obligation. Accordingly, we affirm.

Affirmed.

HART and BIRD, JJ., agree.